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No. 87-1621

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES INTERNAL REVENUE SERVICE, ET AL.,
PETITIONERS

v.

SUSAN B. LONG ET VIR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents contend (Br. in Opp. 7-9) that the petition is jurisdictionally out of time. Their argument rests on the premise that the two appeals decided below "were consolidated only for purposes of argument" (Br. in Opp. 8). Respondents maintain that their petition for rehearing related solely to one of those appeals (Cir. Nos. 86-3678 & 86-3679) and therefore did not toll the time for seeking certiorari from the court of appeals' decision in the other appeal (9th Cir. No. 84-4117). Because it was that latter appeal that involved the TCMP Phase II "check sheets" that are the subject of the petition for certiorari, respondents argue that the petition was required to be filed within 90 days of the issuance of the Ninth Circuit's judgment (at a time when respondents' own rehearing petition was still pending). The premise of respondents' contention is erroneous, and there is no basis for the claim that the petition is out of time.

Although the decision below arises out of what were once two separate appeals from the district court, those "two cases were consolidated on appeal" (Pet. App. 2a). Accordingly, the court of appeals disposed of both appeals in *one* judgment, which listed both appeals in its caption (see *id.* at 13a-14a). It was that single judgment that respondents sought to have reconsidered when they filed their petition for rehearing, and the pendency of that petition necessarily tolled the time to petition from that judgment, regardless of which aspect of the judgment was to be the subject of the certiorari petition. See Sup. Ct. R. 20.4. Indeed, despite respondents' assertion now that their rehearing petition was addressed to only one of the cases on appeal to the Ninth Circuit, respondents themselves listed both appeals in the caption of the rehearing petition, as did the Ninth Circuit in its order denying rehearing (Pet. App. 15a). It is therefore clear that the time to petition for a writ of certiorari from the judgment below did not begin to run until respondents' petition for rehearing was denied on December 3, 1987, and therefore the certiorari petition was timely filed.

2. Respondents contend (Br. in Opp. 5-7) that the petition should be denied because, respondents assert, the government agreed in a pretrial order to release the information at issue, and that agreement is binding. This contention is without merit.

Respondents rely (Br. in Opp. 6) upon paragraph 22 of the pretrial order entered on remand from *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980) (*Long I*), which states that the IRS agreed, in a letter dated July 10, 1981, "to release the Phase II data without taxpayer identification" (C.A. E.R. 32). Respondents also point to one of the district court's findings after trial to the effect that the IRS "voluntarily agreed to disclose that [Phase II] data" (Pet. App. 33a). In

the first place, these references are not to the check sheets at issue here, but to the computer data tapes, which the IRS did in fact release. The check sheets are not referenced in the paragraphs upon which respondents rely.[1] That is why respondents specifically stated in the court of appeals that "the IRS did not agree to release check sheets." 84-4117 Appellees' C.A. Reply Br. 2; see also 84-4117 Appellees' C.A. Br. 20 ("IRS's counsel said the agency had not agreed to release check sheets").

In any event, the agreements to which respondents refer were entered, not "voluntarily" (Br. in Opp. 6), but on remand from *Long I*, and they were addressed to the effect of that decision on the litigation. Whether or not the IRS agreed at that time that *Long I* required the redaction and disclosure of check sheets is quite irrelevant. The Ninth Circuit below held that the redaction and disclosure of check sheets is required by *Long I*, and we do not take issue with that conclusion here. What we do argue here is that *Long I* is a dead letter in light of this Court's explicit rejection of its holding in *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987). Therefore, *Long I* should not now be invoked to force the government to violate 26 U.S.C. 6103 and release private information of a type that this Court has just concluded is required by statute to be kept confidential. See Pet. 6-8.

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[1] The July 10, 1981, letter that is referred to in the pretrial order indicates only that the IRS would turn over a sanitized copy of the Phase II data tapes, and that letter was in response to respondents' motion for partial summary judgment seeking disclosure only of certain TCMP data tapes (see Civ. No. C75-228M Defendant's Mem. in Opp. to Plaintiffs' Motion for Partial Summary Judgment 5-6 & Exh. D). The district court's finding relied upon by respondents refers to the "Phase II data tapes produced on July 15, 1981," *i.e.*, the tapes released in accordance with the July 10, 1981, letter, and to "other documents that are being released," which, of course, does not include the check sheets since they have not been released (see Pet. App. 33a).

3. Respondents argue (Br. in Opp. 10-12) that the check sheets ordered disclosed by the court of appeals are not covered by this Court's decision in *Church of Scientology* because they constitute "statistical data" of the sort that everyone agrees is discloseable under the Haskell Amendment. This contention is wholly without foundation.

It is undisputed that the unedited check sheets at issue contain information identifying individual taxpayers and information taken from their tax returns, along with corrected financial data derived from auditing the returns. The check sheets contain raw tax data, and they do not constitute merely a statistical analysis or "reformulation" (Br. in Opp. 11) of those data.[2] The check sheets therefore plainly are tax "return information" under 26 U.S.C. 6103(b), and, because they contain identifying information, they clearly are not excluded from that definition by the Haskell Amendment. This simple fact was recognized even by the court of appeals, which ordered the check sheets disclosed *only after redaction,* on the erroneous belief that such redaction brings otherwise confidential return information within the exclusion of the Haskell Amendment. See Pet. App. 5a; *Long I.* Now that this Court has made clear that there is "no duty under the FOIA to undertake such redaction" because "removal of identification from return information would not deprive it of protection under § 6103(b)" (*Church of Scientology,*

[2] The TCMP program, of course, does generate a considerable amount of statistical analysis, but those statistics are not what is at issue here. "[A]ll statistical tabulations based on the TCMP" were disclosed to respondents even before the decision in *Long I* (see *Long I,* 596 F.2d at 364 (footnote omitted)). The continuing litigation has been about the disclosure of source material for the TCMP, such as check sheets.

slip op. 8-9), there is no basis for ordering disclosure of the confidential return information embodied in the check sheets.[3]

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of this Court's decision in *Church of Scientology* v. *IRS,* No. 86-472 (Nov. 10, 1987).

Respectfully submitted.

CHARLES FRIED
Solicitor General

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[3] Respondents assert (Br. in Opp. 11-12) that, in amending Section 6103 in 1981, Congress "expressly confirmed that the court of appeals was correct in 1979 when it ordered IRS disclosure of Phase II TCMP data to Susan Long." This argument, which is a direct attack on this Court's holding in *Church of Scientology,* is plainly without foundation. In 1981, Congress simply acted to ensure that information that is used to develop standards for auditing tax returns would not be discloseable, no matter what interpretation was given to the existing language of the Haskell Amendment by the courts. Congress neither confirmed nor rejected the general construction given to the Haskell Amendment in *Long I.* See generally H.R. Conf. Rep. 97-215, 97th Cong., 1st Sess. 264 (1981); H.R. Rep. 97-201, 97th Cong., 1st Sess. 238 n.2, 239 (1981).

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